IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-988

BLUE SHIELD OF SOUTHERN WEST VIRGINIA, INC., ET AL., *Petitioners,*

v.

HERMAN L. BALLARD, ET AL., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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HERMAN L. BALLARD, ET AL., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Blue Shield of Southern West Virginia, Inc., *et al.* petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The Order of the District Court (App. A, *infra,* pp. 1a-4a) is not reported. The opinion of the Court of Appeals (App. B, *infra,* pp. 5a-16a) is reported at 543 F.2d 1075.

JURISDICTION

The judgment of the Court of Appeals was entered on October 19, 1976 (App. C, *infra,* pp. 17a-18a). This petition was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTION PRESENTED

The McCarran-Ferguson Act provides that the federal antitrust laws do not apply to any "business of insurance" which is regulated by state law—except, as provided in § 3(b) of that Act, in cases of "boycott, coercion, or intimidation". The question presented is: *Whether the "boycott exception" extends to an alleged boycott that is directed against persons other than those who are engaged in the "business of insurance", i.e., insurance companies or insurance agents.*

STATUTE INVOLVED

The statutory provisions involved in this case are those set forth in §§ 1, 2 and 3(b) of the McCarran-Ferguson Act, 59 Stat. 34 (1945), 15 U.S.C. §§ 1011, 1012, 1013 (b) (the "McCarran Act"):

McCarran Act § 1, 15 U.S.C. § 1011:

> *Declaration of Policy.*
>
> Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

McCarran Act § 2, 15 U.S.C. § 1012:

> *Regulation by State Law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 20, 1948.*
>
> (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

McCarran Act § 3(b), 15 U.S.C. § 1013(b):

> *Suspension until June 30, 1948, of application of certain Federal laws; Sherman Antitrust Act applicable to agreements to, or acts of, boycott, coercion, or intimidation.*
>
> . . .
>
> (b) Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

STATEMENT

The corporate petitioners, defendants in the District Court, are six West Virginia non-stock, non-profit medical service corporations which furnish a type of medical health-care insurance commonly known as Blue Shield Plans". The individual petitioners, also defendants below, are sixty-eight licensed medical doctors who are, or were, directors or trustees of these corporations. The six respondents, plaintiffs in the District Court, are chiropractors who practice in the State of West Virginia.

Respondents brought this suit in the United States District Court for the Southern District of West Virginia for claimed violations of §§ 1 and 2 of the Sher-

man Act, 15 U.S.C. §§ 1 and 2. The jurisdiction of the District Court was invoked under §§ 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26. In essence, the complaint alleged that the defendants had combined and conspired to refuse to (a) insure plaintiffs' chiropractic services under the plans, (b) pay insureds' claims for plaintiffs' chiropractic services under the plans and (c) permit plaintiffs to become directors or trustees of the plans.

On the defendants' motion, the District Court dismissed the complaint under Rule 12(b)(6), Fed.R.Civ. P. 12 (b)(6), for failure to state a claim upon which relief can be granted, holding (App. A, *infra,* p. 4a) that:

> . . . the activities of the corporate defendants, as described in the complaint, are within the 'business of insurance' and are regulated by the State of West Virginia so as to be exempt from the operation of the Sherman Antitrust Act by reason of the McCarran Act, Title 15 U.S.C. §§ 1011-1013. . . .

The Court of Appeals reversed. In doing so, it did not question the District Court's holding that the activities of the petitioner Blue Cross-Blue Shield health insurance plans clearly constituted the "business of insurance" and were regulated by the State of West Virginia. Rather, the Court reasoned (App. B, *infra,* p. 12a), that "[a]lthough the complaint does not employ the term 'boycott', we believe these allegations sufficiently charge a group boycott in violation of the Sherman Act", and, on the basis of this belief, the Court then concluded that the alleged anticompetitive activities of defendants were not exempt from the Sherman Act since they fell within the "boycott, coercion and intimidation" exception of § 3(b) of the McCarran Act. (App. B, *infra,* at p. 12a).

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH CONSISTENT DECISIONS OF OTHER COURTS OF APPEALS AND NUMEROUS DISTRICT COURTS CONSTRUING THE McCARRAN-FERGUSON ACT'S "BOYCOTT EXCEPTION" TO COVER ONLY BOYCOTTS DIRECTED AT INSURANCE COMPANIES AND AGENTS.

The McCarran Act provides that, absent "boycott, coercion or intimidation," where the "business of insurance" is regulated by state law, it will not be subject to the federal antitrust laws. McCarran Act §§ 2 (b) and 3(b), 15 U.S.C. §§ 1012(b) and 1013(b); *see SEC* v. *National Securities, Inc.,* 393 U.S. 453 (1969). Both of the previous Court of Appeals decisions dealing with the scope of the "boycott exception" have held—in direct conflict with the novel holding below—that the exception is applicable only where the alleged boycott is directed by insurance companies or agents against other insurance companies or agents.

Addrisi v. *Equitable Life Assurance Society of the U.S.,* 503 F.2d 725 (9th Cir. 1974), *cert. denied,* 420 U.S. 929 (1975), decided by the Ninth Circuit, affirmed the district court's dismissal of a complaint for failure to state a claim. The plaintiff had contended that the defendant life insurance company's practice of requiring the purchase of a "credit" insurance policy as a condition to obtaining a "Home Owner" loan constituted an illegal "tie-in" which was also an act of "boycott" or "coercion" under § 3(b) of the McCarran Act, thus depriving the "tie-in" of an antitrust exemption.

In rejecting this argument, the Court of Appeals explained (503 F.2d at 728-29) that,

> . . . it is evident from an examination of the legislative history behind § 1013(b) that the in-

> tent of Congress was to reserve unto the reach of the Sherman Act only a narrow area of restraint of trade activity among those in the business of insurance, namely antitrust acts among insurance companies and agents for the purpose of boycott or coercion *among insurance companies and agents.* [Emphasis added.]

To accord the boycott exception a broader application, the Ninth Circuit noted (503 F.2d at 729), would be to,

> . . . vitiate the McCarran-Ferguson Act in its concept of setting over unto the several states the regulation and protection of the insurer-insured relationship. [SEC v.] National Securities, *supra,* 393 U.S. at page 460 [other citations omitted].

The Fifth Circuit in *Meicler* v. *Aetna Casualty & Surety Co.,* 506 F.2d 732 (5th Cir. 1975), came to the same conclusion in determining that the "boycott exception" was not applicable to a state-regulated insurance plan that set automobile insurance rates in accordance with a driver risk-classification procedure:

> As the district court noted, the legislative history indicates that the boycott exception was designed to reach insurance companies' "black-lists" rather than refusal to sell to a particular segment of the public other than at a specified price. [Citations omitted.] Appellants' broad construction of Section 1013(b) would emasculate the antitrust exemption contained in Section 1012(b) of the McCarran-Ferguson Act. [506 F.2d at 734.]

Virtually every federal district court decision on the "boycott exception" has likewise interpreted it to include only boycotts aimed at those engaged in the "business of insurance". Indeed, in a recent decision

with facts similar to this case, it was held that the "boycott exception" did not apply. In *Frankford Hospital* v. *Blue Cross of Greater Philadelphia,* 1976-2 CCH Trade Cas. ¶ 61,030 (E.D. Pa. 1976), the plaintiff hospital had alleged that a Blue Cross organization had boycotted it by refusing to renew a contract for reimbursement to the hospital of charges incurred by Blue Cross subscribers. After determining that the defendant Blue Cross organization was engaged in the "business of insurance" and was regulated by Pennsylvania law, the District Court, citing *Meicler,* found that the boycott of a hospital did not fall within the scope of the "boycott exception".[1]

---

[1] Other district court cases have adhered to this view. *See, e.g.,* McIlhenny v. American Title Insurance Co., 1972-2 CCH Trade Cas. ¶ 61,076 (E.D. Pa. 1976) (alleged boycott by title insurance companies of new home purchasers); Pastor v. Hartford Fire Insurance Co., 1976-1 CCH Trade Cas. ¶ 60,783 (C.D. Cal. 1976) (alleged boycott by medical liability insurers of physicians); Mathis v. Automobile Club Inter-Insurance Exchange, 1976-2 CCH Trade Cas. ¶ 61,081 (W.D. Mo. 1976) (alleged tie-in of automobile club membership to insurance offered by club); Fry v. John Hancock Mutual Life Insurance Co., 1976-1 CCH Trade Cas. ¶ 60,728 (N.D. Tex. 1975) (facts identical to those in *Adrissi, supra*); Transnational Insurance Co. v. Rosenlund, 261 F. Supp. 12 (D. Ore. 1966) (no "boycott" where a competitor urges a customer to refrain from doing business with another).

Those cases which have found the "boycott exception" to remove an otherwise available exemption have arisen in the context of boycotts among insurers and/or agents *inter se. See, e.g.,* United States v. Insurance Board of Cleveland, 188 F. Supp. 949 (N.D. Ohio 1960) (boycott by independent insurance agents' association of mutual insurance companies and agents doing business with mutuals); California League of Independent Insurance Producers v. Aetna Casualty & Surety Co., 179 F. Supp. 65 (N.D. Cal. 1959) (boycott by insurers of independent agents through setting of agent commissions); Professional and Businessmen's Life Insur-

The cases relied upon by the Fourth Circuit, *Monarch Life Insurance Co.* v. *Loyal Protective Life Insurance Co.*, 326 F.2d 841 (2d Cir. 1963), *cert. denied*, 376 U.S. 952 (1964); *Cooperativa de Seguros Multiples* v. *San Juan*, 294 F. Supp. 627 (D.P.R. 1968); and *Hill* v. *National Auto Glass Co.*, 293 F. Supp. 295 (N.D. Cal. 1968), either dealt with the problem of "blacklisted" insurance companies or agents (*Monarch* and *Seguros Multiples*)—the precise situation to which Congress envisioned that the "boycott exception" would apply—or with an arrangement between an automobile-insurance company and a replacement glass company to boycott other glass companies, a practice which the district court found not to be within the "business of insurance" in the first place (*Hill*).[2]

2. THE FOURTH CIRCUIT'S DECISION DIRECTLY INFRINGES UPON THE STATES' POWER—AS MANDATED BY THE McCARRAN ACT—TO REGULATE THE BUSINESS OF INSURANCE.

The decision below, if allowed to pass unreviewed by this Court, would undermine a consistent line of authority construing and applying § 3 of the McCarran Act and, also, thwart the clear intent of Congress to

ance Co. v. Bankers Life Co., 163 F. Supp. 274 (D. Mont. 1958) (boycott by insurance companies against another insurance company); United States v. New Orleans Insurance Exchange, 148 F. Supp. 915 (E.D. La. 1957) (boycott by insurance agents' association of non-member agents and mutual and direct writer insurance companies).

[2] It should be noted that *none* of the decisions which the Fourth Circuit cited as being the principal foundation for its reversal of the district court's judgment, Cantor v. Detroit Edison Co., —— U.S. ——, 96 S.Ct. 3110 (1976); Hospital Building Co. v. Rex Hospital, —— U.S. ——, 96 S.Ct. 1848 (1976); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975); and Radovich v. National Football League, 352 U.S. 445 (1957), dealt in any way with insurance or the McCarran Act.

permit the states to regulate the "business of insurance" within their jurisdictions. If such a departure from established legislative history and lower federal court precedent is to take place, it should be only after plenary consideration by this Court.

The various states now directly and aggressively regulate the field of health insurance. *See, e.g., Travelers Insurance Co.* v. *Blue Cross of Western Pennsylvania*, 481 F.2d 80, 83 n. 11 (3d Cir. 1973), *cert. denied*, 414 U.S. 1093 (1973) (Pennsylvania statutes). They do so in relation to the rates charged subscribers, the coverages afforded, the payments made to hospitals and others providing services to policyholder-subscribers, the qualifications and eligibility of those providing such services to policyholders and untold other particulars inherent in the large number of health insurance plans now in effect.[3]

If, as the Court below held, parties who do not even attain the status of policyholders, let alone agents and insurers, may bring suit in the federal district courts to protest the scope of a health insurance plan pervasively regulated by a state, there is a substantial danger that important aspects of state insurance regulation will be preempted by the federal antitrust laws. Such supplanting of state regulation would be in direct conflict with the purpose of the McCarran Act.

[3] *Id.* In this case, defendants' Blue Cross-Blue Shield plans are extensively regulated and supervised by the Insurance Commissioner of the State of West Virginia under authority of West Virginia law. *See* W. Va. Code §§ 33-15-1 to 33-15-10 (1975 Repl., 1976 Supp.) ("Accident and Sickness Insurance"); §§ 33-24-1 to 33-24-11 (1975 Repl., 1976 Supp.) ("Hospital Service Corporations, Medical Service Corporations and Dental Service Corporations"); §§ 33-25-1 to 33-25-17 (1975 Repl., 1976 Supp.) ("Health Care Corporations").

The Act was enacted in response to the decision of this Court in *United States* v. *South-Eastern Underwriters Association,* 322 U.S. 533 (1944), which held for the first time that the business of insurance was within and had an effect upon interstate commerce and, therefore, was subject to federal antitrust law. Because of the possibility that extensive state regulation might be preempted by those laws in such important areas as insurance rate-making, insurer solvency, sales, and policy coverages, Congress passed the McCarran Act with the express intent that regulation and taxation of the business of insurance should remain with the states. *See* § 1 of the Act, 15 U.S.C. § 1011.

The "boycott exception" was inserted in the Act to cover situations similar to the anticompetitive excesses involved in the *South-Eastern Underwriters* case, where an association of insurers had boycotted non-members and agents who sold policies of non-members, and, by threats of boycott and other means, coerced those persons to enter the conspiracy. The "boycott exception" was thus *not* designed to cover alleged boycotts of policyholders and others not engaged in the business of insurance.

As this Court pointed out in *SEC* v. *National Securities, Inc.,* 393 U.S. 453, 460 (1969), the McCarran Act's grant of antitrust immunity focuses upon "the relationship between the insurance company and the policyholder", where regulated by state law. It was this form of regulation, which includes state laws governing premiums, risk classifications, assigned risk plans, scope of policy coverages and other terms and conditions of sales, to which the federal antitrust laws were

to defer. In particular, the amount and type of policy coverage intimately and directly concern the very "core of the 'business of insurance'" which the McCarran Act left to state regulation. *Id.*

The Fourth Circuit's decision will wreak havoc with the congressionally mandated scheme of state regulation, will flood the federal district courts with litigation and will put those courts in the position of ruling on the efficacy of state regulation. If the respondent chiropractors can successfully allege that petitioners' health care plans operate to "boycott" them—notwithstanding state regulation which sets or oversees the scope of this coverage in the first place—then any other provider of a health related service may also assert that it, too, has been "boycotted" by being excluded from the range of services covered in such a plan. For example, licensed dentists, acupuncturists, opticians and dieticians could bring like complaints alleging an exclusionary "boycott". Such litigation would not be limited to the field of health insurance but would necessarily include property and casualty insurance, life insurance, title insurance and the numerous other forms of insurance now under state supervision. The net result, contrary to the express mandate of Congress in the McCarran Act, will be that the federal courts will regulate in the states' place.

Finally, the states, health-care insurance companies, other insurance companies and the public must be given some degree of certainty as to what each may expect of the other. The decision of the Court of Appeals accomplishes exactly the opposite result.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF WEST VIRGINIA

CIVIL ACTION NO. 75-0005H

HERMAN L. BALLARD et al., *Plaintffs,*

v.

BLUE SHIELD OF SOUTHERN WEST VIRGINIA, INC., a West Virginia corporation, et al., *Defendants.*

Order

On the 8th day of May, 1975, came plaintiffs Herman L. Ballard, William Jordan, William F. Nease, B. Thomas Rose, Michael P. Via, Merlin R. Zelm by David B. Daugherty and William D. Levine. their attorneys, and came also defendants Blue Shield of Southern West Virginia, Inc., Parkersburg Medical-Surgical Care, Inc., Arthur A. Abplanalp, Jack A. Baur, Samuel Biern, Jr., John J. Brandabur, Bobby Lee Caldwell, Marshall J. Carper, Colin M. Craythorne, Albert C. Esposito, David A. Haught, C. A. Hoffman, Leo Konieczny, M. G. Lambrechts, James W. Lane, William E. Lawton, Jr., Alfred J. Magee, John B. Markey, J. R. Parsons, Alfred K. Pfister, Samir Shabb, Wilson P. Smith, C. E. Stennett, C. Carl Tully, Gates J. Wayburn, Patrick C. Williams, Jr., J. M. Carter, S. W. Goff, R. F. Gustke, R. Connolly, A. P. Brooks, Jr., R. L. Lotshaw, F. D. Gillespie and A. Morales by William T. O'Farrell, their attorney; defendants Medical-Surgical Service, Inc., Lawrence B. Thrush, John D. H. Wilson and Lynwood D. Zinn by James M. Wilson, their attorney; defendants West Virginia Medical Service, Inc., Francis J. Gaydosh, William Paul Bradford, N. J. Joseph, Harry S. Weeks, Joseph N. Aceto, Kenneth J. Allen, Herbert G. Dickie, R. V. Drinkard, James Arbaugh, Louis E. Baron, A. K. Butler, Terrell Coffield, Richard E. Flood, Michael A. Gaydosh, Norris Groves, Donald Hofreuter, L. A. Lyon,

Nick L. Terezis and Robert R. Weiler by Frederick P. Stamp, Jr., their attorney; defendants Surgical Service, Inc., Rufus Brittain, Ray Burger, Upshur Higginbotham, James E. Powers, R. O. Rogers, Jr., Howard C. Scott and A. J. Villani by William T. Hancock and Charles W. Davis, their attorney; Morgantown Medical Surgical Service, Inc., Eldon B. Tucker, Clark Sleeth, J. C. Pickett, Margaret Stemple, Charles Andrews, Carl Johnson and J. F. Stecker by Fred Adkins, their attorney, and defendant West Virginia State Medical Association by W. E. Mohler, its attorney.

Whereupon, the Court being of the opinion that this action, as described in plaintiffs' complaint, does not satisfy the requirements of a class action as set forth in Rule 23(a) and (b) of the Federal Rules of Civil Procedure, it is hereby ORDERED, in accordance with Rule 23(c) of the Federal Rules of Civil Procedure, that this action shall not proceed as a class action.

Whereupon, defendant West Virginia State Medical Association, by its attorney, pursuant to its motion heretofore filed herein, moved the Court to dismiss this action as to it for the reasons set forth in said motion, and the matter was argued by counsel. The Court, having considered the pleadings filed herein and the arguments of counsel, is of the opinion that the complaint fails to state a cause of action against this defendant and it is, accordingly, ORDERED that this action be, and it is hereby, dismissed as to the defendant West Virginia State Medical Association.

Whereupon, defendants Rufus Brittain and Howard C. Scott, by their attorneys, pursuant to their motion heretofore filed herein, moved the Court to dismiss this action as to them for the reasons set forth in said motion, and the matter was argued by counsel. The Court, having considered the pleadings filed herein and the arguments of counsel is of the opinion that these defendants were not properly served with process in this action and that this Court does

not, therefore, have *in personam* jurisdiction or venue as to these two defendants. Accordingly, it is ORDERED that this action be, and it is hereby, dismissed as to defendants Rufus Brittain and Howard C. Scott.

Whereupon, defendants Medical-Surgical Service, Inc., Lawrence B. Thrush, John D. H. Wilson, Lynwood D. Zinn, West Virginia Medical Service, Inc., Francis J. Gaydosh, William Paul Bradford, N. J. Joseph, Harry S. Weeks, Joseph N. Aceto, Kenneth J. Allen, Herbert G. Dickie, R. V. Drinkard, James Arbaugh, Louis E. Baron, A. K. Butler, Terrell Coffield, Richard E. Flood, Michael A. Gaydosh, Norris Graves, Donald Hofreuter, L. A. Lyon, Nich L. Terezis, Robert R. Weiler, Morgantown Medical Surgical Service, Inc., Eldon B. Tucker, Clark Sleeth, . C. Pickett, Margaret Stemple, Charles Andrews, Carl Johnson and J. F. Stecker, by their respective attorneys, pursuant to their separate motions filed herein, moved the Court to dismiss this action as to them for the reason that this Court does not have *in personam* jurisdiction or venue as to these defendants, and the matter was argued by counsel. The Court, having considered all the pleadings filed herein and the arguments of counsel is of the opinion that this Court does have *in personam* jurisdiction and that venue is proper as to these defendants and it is, therefore, ORDERED that said motions be, and they are hereby, denied.

Whereupon, the remaining defendants by their respective attorneys, pursuant to their respective motions heretofore filed herein, moved the Court to dismiss this action for the reasons set forth in said motions and the matter was argued by counsel. TheCourt, having considered all the pleadings filed herein and the arguments of counsel, is of the opinion that the complaint fails to state a cause of action against these defendants for the reason that it fails to show any restraint of trade by these defendants or that any of the alleged activities of these defendants had a direct and substantial effect upon commerce among the

states so as to invoke this Court's jurisdiction under the Sherman Antitrust Act, Title 15 USC §§ 1 and 2. In addition, the Court is of the opinion that the activities of the corporate defendants, as described in the complaint, are within the "business of insurance" and are regulated by the State of West Virginia so as to be exempt from the operation of the Sherman Antitrust Act by reason of the McCarran Act, Title 15 USC §§ 1011-1013. Further, the Court is of the opinion that the individual defendants, practicing medical doctors, are members of a "learned profession" and their activities, as described in the complaint, are neither trade nor commerce, and, therefore, not subject to the provisions of the Sherman Antitrust Act. Accordingly, it is ORDERED that this action be, and it is hereby, dismissed as to the remaining defendants, with prejudice to the plaintiffs.

ENTER: JUNE 23, 1975.

K. K. HALL

UNITED STATES DISTRICT JUDGE

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 75-1982

HERMAN L. BALLARD, WILLIAM JORDAN, WILLIAM F. NEASE, B. THOMAS ROSS, MICHAEL P. VIA, MERLIN R. ZELM, individually and as representative members of a class,
Appellants,

v.

BLUE SHIELD OF SOUTHERN WEST VIRGINIA, INC., a West Virginia corporation, PARKERSBURG MEDICAL-SURGICAL CARE, INC., a West Virginia corporation, MONONGAHELA MEDICAL-SURGICAL SERVICE, INC., a West Virginia corporation, WEST VIRGINIA MEDICAL SERVICE, INC., a West Virginia corporation, SURGICAL SERVICE, INC., a West Virginia corporation, MORGANTOWN MEDICAL-SURGICAL SEERVICE, INC., a West Virginia corporation, WEST VIRGINIA STATE MEDICAL ASSOCIATION, FRANCIS J. GAYDOSH, WILLIAM PAUL BRADFORD, N. K. JOSEPH, HERBERT G. DICKIE, R. V. DRINKARD, HARRY S. WEEKS, JOSEPH N. ACETO, KENNETH J. ALLEN, JAMES ARBAUGH, LOUIS E. BARON, A. K. BUTLER, TERRELL COFFIELD, RICHARD E. FLOOD, MICHAEL A. GAYDOSH, NORRIS GROVES, DONALD HOFREUTER, L. A. LYON, NICK L. TEREZIS, ROBERT R. WEILER, ARTHUR A. ARPLANALP, JACK H. BAUR, SAMUEL BIERN, JR., JOHN J. BRANDABUR, BOBBY LEE CALDWELL, MARSHALL J. CARPER, COLIN M. CRAYTHORNE, ALBERT C. ESPOSITO, DAVID A. HAUGHT, C. A. HOFFMAN, LEO KONIECZNY, M. G. LAMBRECHTS, JAMES W. LANE, WILLIAM E. LAWTON, JR., ALFRED J. MAGEE, JOHN B. MARKEY, J. R. PARSONS, ALFRED K. PFISTER, SAMIR SHABB, WILSON P. SMITH, C. E. STENNETT, C. CARL TULLY, GATES J. WAYBURN, PATRICK C. WILLIAMS, JR., J. M. CARTER, S. W. GOFF, R. F. GUSTKE, R. CONNOLLY, A. P. BROOKS, JR., R. L. LOTSHAW, F. D. GILLESPIE, A. MORALES, RUFUS BRITTAIN, RAY BURGER, UPSHUR

HIGGINBOTHAM, JAMES E. POWERS, R. O. ROGERS, JR., HOWARD C. SCOTT, A. J. VILLANT, LAWRENCE B. THRUSH, JOHN D. H. WILSON, LYNWOOD D. ZINN, ELDON B. TUCKER, CLARK SLEETH, J. C. PICKETT, MARGARET STEMPLE, CHARLES ANDREWS, CARL JOHNSON, J. F. STECKER, *Appellees.*

No. 75-1983

HERMAN L. BALLARD, WILLIAM JORDAN, WILLIAM F. NEASE, B. THOMAS ROSS, MICHAEL P. VIA, MERLIN R. ZELM, individually and as representative members of a class, *Appellees,*

MONONGAHELA MEDICAL-SURGICAL SERVICE, INC., a West Virginia corporation, LAWRENCE B. THRUSH, JOHN D. H. WILSON, LYNWOOD D. ZINN, *Appellants,*

and

BLUE SHIELD OF SOUTHERN WEST VIRGINIA, INC., a West Virginia corporation, PARKERSBURG MEDICAL-SURGICAL CARE, INC., a West Virginia corporation, WEST VIRGINIA MEDICAL SERVICE, INC., a West Virginia corporation, SURGICAL SERVICE, INC., a West Virginia corporation, MORGANTOWN MEDICAL-SURGICAL SERVICE, INC., a West Virginia corporation, WEST VIRGINIA STATE MEDICAL ASSOCIATION, FRANCIS J. GAYDOSH, WILLIAM PAUL BRADFORD, N. K. JOSEPH, HERBERT G. DICKIE, R. V. DRINKARD, HARRY S. WEEKS, JOSEPH N. ACETO, KENNETH J. ALLEN, JAMES ARBAUGH, LOUIS E. BARON, A. K. BUTLER, TERRELL COFFIELD, RICHARD E. FLOOD, MICHAEL A. GAYDOSH, NORRIS GROVES, DONALD HOFREUTER, L. A. LYON, NICK L. TEREZIS, ROBERT R. WEILER, ARTHUR A. ABPLANALP, JACK H. BAUR, SAMUEL BRIERN, JR., JOHN J. BRANDABUR, BOBBY LEE CALDWELL, MARSHALL J. CARPER, COLIN M. CRAYTHORNE, ALBERT C. ESPOSITO, DAVID A. HAUGHT, C. A. HOFFMAN, LEO KONIECZNY, M. G. LAMBRECHTS, JAMES W. LANE, WILLIAM E. LAWTON, JR., ALFRED J. MAGEE, JOHN B. MARKEY, J. R. PARSONS,

ALFRED K. PFISTER, SAMIR SHABB, WILSON P. SMITH, C. E. STENNETT, C. CARL TULLY, GATES J. WAYBURN, PATRICK C. WILLIAMS, JR., J. M. CARTER, S. W. GOFF, R. F. GUSTKE, R. CONNOLLY, A. P. BROOKS, JR., R. L. LOTSHAW, F. D. GILLESPIE, A. MORALES, RUFUS BRITTAIN, RAY BURGER, UPSHUR HIGGINBOTHAM, JAMES E. POWERS, R. O. ROGERS, JR., HOWARD C. SCOTT, A. J. VILLANT, ELDON B. TUCKER, CLARK SLEETH, J. C. PICKETT, MARGARET STEMPLE, CHARLES ANDREWS, CARL JOHNSON, J. F. STECKER, *Defendants.*

No. 75-1984

HERMAN L. BALLARD, WILLIAM JORDAN, WILLIAM F. NEASE, B. THOMAS ROSS, MICHAEL P. VIA, MERLIN R. ZELM, individually and as representative members of a class, *Appellees,*

v.

WEST VIRGINIA MEDICAL SERVICE, INC., a West Virginia corporation, FRANCIS J. GAYDOSH, WILLIAM PAUL BRADFORD, N. K. JOSEPH, HERBERT G. DICKIE, R. V. DRINKARD, HARRY S. WEEKS, JOSEPH N. ACETO, KENNETH J. ALLEN, JAMES ARBAUGH, LOUIS E. BARON, A. K. BUTLER, TERRELL COFFIELD, RICHARD E. FLOOD, MICHAEL A. GAYDOSH, NORRIS GROVES, DONALD HOFREUTER, L. A. LYON, NICK L. TEREZIS, ROBERT R. WEILER, *Appellants,*

and

BLUE SHIELD OF SOUTHERN WEST VIRGINIA, INC., a West Virginia corporation, PARKERSBURG MEDICAL-SURGICAL CARE, INC., a West Virginia corporation, MONONGAHELA MEDICAL-SURGICAL SERVICE, INC., a West Virginia corporation, SURGICAL SERVICE, INC., a West Virginia corporation, MORGANTOWN MEDICAL-SURGICAL SERVICE, INC., a West Virginia corporation, WEST VIRGINIA STATE MEDICAL ASSOCIATION, ARTHUR A. ABPLANALP, JACK H. BAUR, SAMUEL BIERN, JR., JOHN J. BRANDABUR,

BOBBY LEE CALDWELL, MARSHALL J. CARPER, COLIN M. CRAYTHORNE, ALBERT C. ESPOSITO, DAVID A. HAUGHT, C. A. HOFFMAN, LEO KONIECZNY, M. G. LAMBRECHTS, JAMES W. LANE, WILLIAM E. LAWTON, JR., ALFRED J. MAGEE, JOHN B. MARKEY, J. R. PARSONS, ALFRED K. PFISTER, SAMIR SHARR, WILSON P. SMITH, C. E. STENNETT, C. CARL TULLY, GATES J. WAYBURN, PATRICK C. WILLIAMS, JR., J. M. CARTER, S. W. GOFF, R. F. GUSTKE, R. CONNOLLY, A. P. BROOKS, JR., R. L. LOTSHAW, F. D. GILLESPIE, A. MORALES, RUFUS BRITTAIN, RAY BURGER, UPSHUR HIGGINBOTHAM, JAMES E. POWERS, R. O. ROGERS, JR., HOWARD C. SCOTT, A. J. VILLANT, LAWRENCE B. THRUSH, JOHN D. H. WILSON, LYNWOOD D. ZINN, ELDON B. TUCKER, CLARK SLEETH, J. C. PICKETT, MARGARET STEMPLE, CHARLES ANDREWS, CARL JOHNSON, J. F. STECKER, *Defendants.*

Appeal from the United States District Court for the Southern District of West Virginia, at Huntington. K. K. Hall, District Judge.

Argued April 9, 1976 Decided October 19, 1976.

Before BOREMAN *and* BRYAN, *Senior Circuit Judges* and BUTZNER, *Circuit Judge.*

William D. Levine (Marshall and St. Clair, David B. Daugherty on brief) for appellants in 75-1982 and for appellees in 75-1983 and 75-1984; William T. O'Farrell, Frederick P. Stamp, Jr. (Schrader, Miller, Stamp & Recht; Jackson, Kelly, Holt and O'Farrell; William T. Hancock, Charles W. Davis, Richardson, Kemper and Hancock; Fred Adkins, Thomas H. Gilpin, Huddleston, Bolen, Beatty, Porter and Copen; W. E. Mohler; Herbert G. Underwood, James M. Wilson, Steptoe and Johnson on brief) for appellants in 75-1983 and 75-1984 and appellees in 75-1982.

BUTZNER, *Circuit Judge:*

Six West Virginia chiropractors appeal from a judgment of the district court dismissing their antitrust suit against six corporations that sell Blue Cross-Blue Shield health insurance, the doctors who are directors of the corporations, and the West Virginia State Medical Association. Several of the defendants appeal from the denial of their motion to dismiss for lack of volume. Relying largely on three recent Supreme Court opinions,[1] which were not available to the district judge, we reverse the judgment of dismissal, affirm the order sustaining venue, and remand the case for further proceedings.

The chiropractors allege that the physicians, the medical association, and the corporations combined and conspired to refuse health insurance coverage for chiropractic services. This denial of coverage, the chiropractors claim, violates sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2) because it restraints and monopolizes the distribution of both health services and health insurance by making chiropractic services financially unattractive to consumers. They charge that the purpose and effect of the denial of coverage is to eliminate the competition of chiropractors throughout the state. The plaintiffs also asked for certification of the case as a class action on behalf of all West Virginia chiropractors.

The defendants moved to dismiss the case for lack of jurisdiction and venue and for failure to state a claim for which relief can be granted.

The district court dismissed the case on the pleadings, holding that the alleged conduct did not affect interstate

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[1] Cantor v. Detroit Edison Co., 44 U.S.L.W. 5357 (U.S. July 6, 1976); Hospital Building Co. v. Rex Hospital, 44 U.S.L.W. 4683 (U.S. May 24, 1976); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975). All were decided after the district court entered its judgment.

commerce and that the McCarran-Ferguson Act and the learned profession doctrine exempted the defendants' activities from the antitrust laws. The court denied the defendants' motion to dismiss for improper venue and the chiropractors' request for certification of a class action.

I

The complaint alleges that the defendants' violations of the Sherman Act adversely affect interstate commerce by reducing the sale of therapeutic devices and equipment that are manufactured outside of West Virginia and purchased by chiropractors and their patients in the state. The complaint also charges that the violations increase the cost of health care to a substantial number of patients who travel in interstate commerce for chiropractic treatment, and that the defendants' monopoly injures interstate insurance companies that pay chiropractic claims.

It is well settled "[t]hat wholly local business restraints can produce the effects condemned by the Sherman Act." United States v. Employing Plasterers Association, 347 U.S. 186, 189 (1954). Although merely incidental effects are insufficient, the restraints need not have a direct effect on interstate commerce to support jurisdiction. Doctors, Inc. v. Blue Cross of Greater Philadelphia, 490 F.2d 48, 51-53 (3rd Cir. 1973). The applicable test is whether "the allegations of the complaint, if proven, could show that the conspiracy resulted in '*unreasonable burdens on the free and uninterrupted flow*' " of goods and services in interstate commerce. Hospital Building Co. v. Rex Hospital, 44 U.S.L.W. 4683, 4685 (U.S. May 4, 1976).

In *Hospital Building Co.*, the hospital alleged that it purchased a substantial proportion of its supplies from out-of-state sources, that much of its revenue came from out of state, that it paid a management fee to an out-of-state company, and that its financing for a proposed expansion was from out-of-state lenders. The Court held this

combination of factors to be sufficient to establish a substantial effect on interstate commerce within the meaning of the act. It also reiterated that "*in* antitrust cases, . . . dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly." 44 U.S. L.W. at 4685.

Following the "rigorous standard" prescribed in *Hospital Building Co.*, 44 U.S.L.W. at 4685, we hold that the district court erred in dismissing this case on the pleadings. It is possible that the alleged reduction or elimination of the chiropractors' business throughout the entire State of West Virginia may adversely affect interstate commerce. At this stage in the proceedings, we cannot say with certainty that the effect on commerce is so insubstantial as to deny federal jurisdiction.

II

The district court also held that the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1013, exempts the corporate defendants from the operation of the antitrust laws because they conduct the business of insurance under regulation by West Virginia. The court's ruling, however, skirts a pivotal issue of this controversy.

The McCarran-Ferguson Act's exemption of state regulated insurance business from federal antitrust laws is not absolute. Congress expressly provided that the Sherman Act should remain applicable to boycotts and agreement to boycott. 15 U.S.C. § 1013(b).[2] *See generally* 7 Von Kalinowski, Antitrust Laws and Trade Regulation § 47.03 (1976).

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[2] Title 15 U.S.C. § 1012(b) grants the business of insurance a qualified exemption from the Sherman Act. This exemption is specifically limited by 15 U.S.C. § 1013(b), which provides:

> "Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation."

The Sherman Act proscribes even a peaceful, primary boycott designed to dissuade persons from dealing with others. Duplex Printing Press Co. v. Deering, 254 U.S. 443, 466-68 (1921). Consequently, the McCarran-Ferguson Act condemns this type of boycott. Cooperatives de Seguros Multiples v. San Juan, 294 F.Supp. 627 (D. P.R. 1968).

The complaint alleges that the defendants have combined and conspired to refuse insurance coverage for the services offered by chiropractors, to refuse payment of claims for services rendered by chiropractors even though claims for identical services rendered by physicians are honored, and to refuse permission for chiropractors to participate as officers in the companies offering Blue Shield Plans. Although the complaint does not employ the term "boycott", we believe these allegations sufficiently charge a group boycott in violation of the Sherman Act. *Cf.* Radovich v. National Football League, 352 U.S. 445, 453 (1957). The complaint, therefore, alleges conduct that falls within § 1013(b) of the McCarran-Ferguson Act subjecting the insurance companies, and those who have conspired with them, to the antitrust laws. *Cf.* Monarch Life Insurance Co. v. Loyal Protective Life Insurance Co., 326 F.2d 841 (2d Cir. 1963); Hill v. National Auto Glass Co., 293 F.Supp. 295 (N.D. Calif. 1968).

III

The defendants contend that under the doctrine of Parker v. Brown, 317 U.S. 341 (1943), they enjoy an exemption from the Sherman Act "wider in scope" than that afforded by the McCarran-Ferguson Act. The district judge properly declined to base his decision on this defense. The doctrine of *Parker* v. *Brown* deals with ascertaining the extent to which Congress intended a state's displacement of competition to be exempt from the Sherman Act. Section 1013(b) of the McCarran-Ferguson Act expresses congressional intention to subject boycotts by insurance companies to the Sherman Act. Consequently,

there can be no justification for utilizing the principles of *Parker* v. *Brown* to impute a contrary intent to Congress.[3]

Furthermore, no action on the part of West Virginia compels the defendants to exclude the chiropractors from their insurance plans. West Virginia law specifically authorizes the defendant companies to insure the costs of chiropractic treatment,[4] but the defendants have elected not to provide this coverage. Therefore, they can claim no immunity under *Parker* v. *Brown*. Cantor v. Detroit Edison Co., 44 U.S.L.W. 5357 (U.S. July 6, 1976); Goldfarb v. Virginia State Bar, 421 U.S. 773, 788-92 (1975).

IV

The district court ruled that the physicians "are members of a 'learned profession' and their activities, as described in the complaint, are neither trade nor commerce, and, therefore, not subject to the provisions of the Sherman Act." We believe, however, that this ruling is not in accord with Supreme Court decisions where the learned profession defense was rejected.

Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), and American Medical Association v. United States, 317 U.S. 519 (1943), teach that the payment exchanged for professional services constitutes trade or commerce. The Sherman Act contains neither an express nor an implied exclusion of commercial activity generated by the professions. Nor does the Act exempt practictioners of a learned pro-

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[3] Congress, of course, was aware of *Parker* v. *Brown* when it considered the McCarran-Ferguson Act. *See* Cantor v. Detroit Edison Co., 44 U.S.L.W. 5357, 5366 n.4 (U.S. July 6, 1976) (Blackmun, J., concurring). Mr. Justice Blackmun's observations about express grants of antitrust immunity in such laws as the McCarran-Ferguson Act cast doubt on the rationale, but probably not the result, of Allstate Insurance Co. v. Lanier, 361 F.2d 870 (4th Cir. 1966).

[4] West Virginia Code §§ 33-24-2(d), (e), and -3(b).

fession from the class of persons who are subject to its prohibitions. Therefore, if the commerce produced by professional services is interstate in character, it is covered by the Sherman Act, and a conspiracy to restrain or monopolize it is prohibited. The professional status of the persons who engage in this commercial activity, as well as the status of those who conspire to restrain or monopolize it, is immaterial. *Goldfarb,* 421 U.S. at 785-88; *American Medical Association,* 217 U.S. at 528. *See generally* 7 Von Kalinowski, Antitrust Laws and Trade Regulation §§ 49.01-.02(1976).

The case before us involves an alleged conspiracy to restrain and monopolize a means of paying for professional services. We perceive no material distinction between payment for legal services, as in *Goldfarb,* and payment for health care, as in *American Medical Association* or here—both are commerce. Since this case involves the alleged restraint and monopolization of a commercial aspect of the practice of a profession, as distinguished from such other aspects as the professional qualifications of the practitioner, we hold that the professional status of the physicians affords them no defense.

V

West Virginia Medical Service, Inc., Monongahela Medical-Surgical Service, Inc., and the doctors on their boards appeal from the district court's denial of their motions to dismiss for improper venue. These defendants either transact business or reside in the Northern District of West Virginia. This action was brought in the Southern District of West Virginia where the other corporations transact business and the other individual defendants reside.

Although venue in antitrust actions is generally governed by 15 U.S.C. §§ 15, 22—which allow suit in the district where the defendant resides, is found, has an agent, or transacts business—these statutes are not exclusive. *See*

Adams Dairy Co. v. National Dairy Products Corp., 293 F.Supp. 1135, 1140-41 (W.D. Mo. 1968). Title 28 U.S.C. § 1392(a) provides that "[a]ny civil action, not of a local nature, against defendants residing in different districts in the same State, may be brought in any of such districts." This statute is applicable to antitrust actions. *See* Anderson-Friberg, Inc. v. Justin R. Clary & Son, Inc., 98 F.Supp. 75 (S.D.N.Y. 1951). Since some of the defendants reside or transact business in the Southern District of West Virginia, venue is proper.

VI

The district court denied the plaintiff's motion to maintain the case as a class action. It orally ruled that the class, consisting of 45 chiropractors, was "not so numerous that it could not be identified." The court added that it was not necessary "for a decision in this case to have all members alleged to be of this class represented as a class." In its formal order, it simply recited that the action "does not satisfy the requirements of a class action as set forth in Rule 23(a) and (b) . . . "

No consistent standard has been developed for establishing numerosity in class actions. *See* 7 Wright & Miller, Federal Practice and Procedures § 1762 (1972). We have held that class certification is within the discretion of the district court and will not be reversed unless abuse is shown. We have also requested district courts to explain the reasons for their rulings so there will be an adequate record for review. Barnett v. W. T. Grant Co., 518 F.2d 543, 546-48 (4th Cir. 1975). The district court, however, did not explain, other than in the most general terms, why the class did not satisfy the requirements of Rule 23. It made no finding whether joinder would be impracticable, and the reasons it gave, although worthy of consideration, are not among the essential criteria set forth in the Rule.

Approving a class as small as 18 in Cypress v. Newport News General & Nonsectarian Hospital Association, 375

F.2d 648, 652-54 (4th Cir. 1967), we observed that numbers alone are not controlling, but on the contrary, all the circumstances of the case should be taken into consideration. There are other factors besides the number of chiropractors and knowledge of their identity which should be considered. Class actions are frequently maintained in antitrust cases because of the many questions of law and fact that are common to the members of the class. *See* 7A Wright & Miller, Federal Practice and Procedures § 1781 (1972). Moreover, discovery would be repetitive and unduly expensive if the parties engage in individual suits.

We cannot tell whether the district court gave any consideration to these and other factors which the parties stress. We therefore vacate the order denying the motion to proceed as a class action. On remand, the district court should reconsider the question and explain the reasons for whatever decision it reaches, taking into consideration the criteria set forth in Rule 23.

No. 75-1982 reversed and remanded.

No. 75-1983 affirmed.

No. 75-1984 affirmed.

APPENDIX C

Judgment

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

(ENTERED NOVEMBER 11, 1976)

No. 75-1982

Herman L. Ballard, William Jordan, William F. Nease, B. Thomas Ross, Michael P. Via, Merlin R. Zelm, individually and as representative members of a class,
Appellants,

versus

Blue Shield of Southern West Virginia, Inc., a West Virginia corporation, Parkersburg Medical-Surgical Care, Inc., a West Virginia corporation, Monongahela Medical-Surgical Service, Inc., a West Virginia corporation, West Virginia Medical Service, Inc., a West Virginia corporation, Surgical Service, Inc., a West Virginia corporation, Morgantown Medical-Surgical Service, Inc., a West Virginia corporation, West Virginia State Medical Association, Francis J. Gaydosh, William Paul Bradford, N. K. Joseph, Herbert G. Dickie, R. V. Drinkard, Harry S. Weeks, Joseph N. Aceto, Kenneth J. Allen, James Arbaugh, Louis E. Baron, A. K. Butler, Terrell Coffield, Richard E. Flood, Michael A. Gaydosh, Norris Groves, Donald Hofreuter, L. A. Lyon, Nick L. Terezis, Robert R. Weiler, Arthur A. Abplanalp, Jack H. Baur, Samuel Biern, Jr., John J. Brandabur, Bobby Lee Caldwell, Marshall J. Carper, Colin M. Craythorne, Albert C. Esposito, David A. Haught, C. A. Hoffman, Leo Konieczny, M. G. Lambrechts, James W. Lane, William E. Lawton, Jr., Alfred J. Magee, John B. Markey, J. R. Parsons, Alfred K. Pfister, Samir Shabb, Wilson P. Smith, C. E. Stennett, C. Carl Tully, Gates J. Wayburn, Patrick C.

Williams, Jr., J. M. Carter, S. W. Goff, R. F. Gustke, R. Connolly, A. P. Brooks, Jr., R. L. Lotshaw, F. D. Gillespie, A. Morales, Rufus Brittain, Ray Burger, Upshur Higginbotham, James E. Powers, R. O. Rogers, Jr., Howard C. Scott, A. J. Villant, Lawrence B. Thrush, John D. H. Wilson, Lynwood D. Zinn, Eldon B. Tucker, Clark Sleeth, J. C. Pickett, Margaret Stemple, Charles Andrews, Carl Johnson, J. F. Stecker,

Appellees.

APPEAL FROM the United States District Court for the Southern District of West Virginia.

THIS CAUSE came on to be heard on the record from the United States District Court for the Southern District of West Virginia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed. The case is remanded to the United States District Court for the Southern District of West Virginia, at Huntington, for further proceedings consistent with the opinion of this court filed herewith.

/s/ WILLIAM K. SLATE, II
Clerk

(FILED OCTOBER 19, 1976)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-988

BLUE SHIELD OF SOUTHERN WEST VIRGINIA, INC., ET AL., *Petitioners,*

v.

HERMAN L. BALLARD, ET AL., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

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v.

HERMAN L. BALLARD, ET AL., *Respondents,*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

The Respondents, Herman L. Ballard, *et al.,* submit that the petition for a writ of certiorari to review the judgement of the United States Court of Appeals for the Fourth Circuit in this case should be denied. The Respondents concur in the Petitioners' discussion of the *Opinions Below, Jurisdiction, Questions Presented,* and *Statute Involved,* contained in the Petition for Certiorari which has been filed herein, and the Appendix to the Petition for Certiorari is incorporated herein by reference.

COUNTERSTATEMENT OF THE CASE

On January 7, 1975, six Huntington, West Virginia chiropractors commenced this civil antitrust suit on behalf of themselves and the other doctors of chiropractic who practice their profession in the State of West Virginia. Named as defendants are the five Blue Cross - Blue Shield companies authorized to do business in West Virginia, the individual medical doctors who have served as directors for those companies, and the West Virginia State Medical Association. The complaint charges that the defendants have combined and conspired in violation of the antitrust laws to monopolize the health care market in the State of West Virginia and to deprive the chiropractors of their right to practice their profession therein.

In essence, the chiropractors complain that by abusing its control over the local Blue Cross - Blue Shield companies, the medical profession is attempting to eliminate the chiropractic profession as a viable source of health care services. According to the chiropractors' theory of the case, two methods are being used to accomplish this unlawful scheme. First, the Blue Cross - Blue Shield companies are engaging in a primary group boycott of the chiropractic profession by refusing to pay for chiropractic treatment even though payment is made for similar treatment when provided by medical doctors and by refusing to provide benefits for chiropractic service which differ from those provided by the medical profession. Second, the Blue Cross - Blue Shield monopoly power in the West Virginia health insurance market is being used to discriminate against competing health insurance companies that are willing to provide benefits for chiropractic treatment. By these means, the co-conspirators have, in effect, engaged in a secondary boycott by economically persuading potential patients to refrain from seeking chiropractic care because of the personal cost to them, in favor of medical treatment where the expense is absorbed by the patient's insurance carrier.

In response to the complaint, the defendants moved to dismiss for failure to state a claim upon which relief could be granted. A hearing was held in the United States District Court for the Southern District of West Virginia, and after considering the arguments of counsel, that court ruled that

the case could not proceed as a class action, that the complaint failed to state a claim upon which relief could be granted, and that the Federal Courts did not have subject matter jurisdiction over the matters alleged. Later, the District Judge notified counsel that he was ruling that the McCarran-Ferguson Act exempted the Blue Cross - Blue Shield companies from the antitrust laws and that the medical doctors enjoyed immunity as members of a learned profession. On June 23, 1975, a final order was entered dismissing this case with prejudice (Pet. App. A) and the plaintiffs appealed to the United States Court of Appeals for the Fourth Circuit.

The Court of Appeals reversed the District Court and remanded the case for further proceedings. Specifically, with respect to the Petitioners' contention that the McCarran-Ferguson Act exempts the Blue Cross - Blue Shield companies from the antitrust laws, the Court of Appeals stated (Pet. App. B at p. 12a):

> The complaint alleges that the defendants have combined and conspired to refuse insurance coverage for the services offered by chiropractors, to refuse payment of claims for services rendered by chiropractors even though claims for identical services rendered by physicians are honored, and to refuse permission for chiropractors to participate as officers in the companies offering Blue Shield Plans. Although the complaint did not employ the term "boycott," we believe these allegations sufficiently charge a group boycott in violation of the Sherman Act. * * * The complaint, therefore, alleges conduct that falls within § 1013 (b) of the McCarran-Ferguson Act subjecting the insurance companies, and those who have conspired with them, to the antitrust laws.

It is submitted that this decision is neither novel nor unique. It does no more than give effect to the unambiguous language of the McCarran-Ferguson Act by holding the plaintiffs' allegations of "boycott" state a claim upon which relief can

be granted. No ruling on the scope of the Act was made, nor did the Court of Appeals conclude that the insurance companies' conduct violated the antitrust laws. On the contrary, the Fourth Circuit's decision merely held that the chiropractors had alleged an insurance company boycott, which did not fall within the scope of the McCarran-Ferguson Act's antitrust exemption. Because of this, it is submitted that at this time review by the Supreme Court would be premature and that the Petition for Certiorari should be denied.

REASONS FOR REFUSING THE WRIT

The arguments presented in support of the petition for a writ of certiorari are twofold. First, the petitioners assert that the Fourth Circuit's decision is inconsistent with a well-established line of McCarran-Ferguson Act cases in other circuits; and second, that this decision will open the floodgates of litigation to private plaintiffs who feel aggrieved by a violation of the antitrust laws. Neither of these arguments is well taken. The consistent line of appellate decisions to which the petitioners refer are most unpersuasive, not only because they are totally devoid of any reasoning to support the holding enunciated, but also because they completely eschew the unambiguous language of the McCarran-Ferguson "boycott" exception. The petitioners' contention that the Fourth Circuit's decision is subversive because it will permit parties who have been injured by anticompetitive conduct to seek relief in the federal courts is similarly unpersuasive, being a conclusion which runs contrary to our national policy of encouraging private enforcement of the antitrust laws.

By enacting the McCarran-Ferguson Act, Congress did not intend to bestow an absolute privilege to violate the antitrust laws upon insurance companies. Rather, that law was enacted solely to permit the States to regulate the relationship between an insurance company and its policy holders. *S. E. C.* v. *National Securities, Inc.*, 393 U. S. 453 (1969). It was never the intention of Congress to allow the states to immunize those types of pernicious, anticompetitive conduct which have

absolutely no economic value. *Monarch Life Ins. Co.* v. *Loyal Protective Life Ins. Co.*, 326 F.2d 841 (2nd Cir. 1963), *cert. denied*, 376 U. S. 952 (1964). Accordingly, the Act simply declared that "Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott coerce or intimidate, or act of boycott, coercion or intimidation." 15 U. S. C. §1013(b). A less ambiguous statement could not have been drafted, and there is nothing in that language which would limit the application of the law in the manner argued by the petitioners. Instead, the terms of the Act are plenary with respect to the excepted activity; its effect does not vary with the identity of the target against whom the anticompetitive conduct of an insurance company is aimed.

Certainly, the Respondents recognize that two Courts of Appeals have apparently limited the application of McCarran-Ferguson Act to situations in which one insurance company has directed its anticompetitive activity against another insurance company or agent. *Meicler* v. *Aetna Casualty & Surety Company*, 506 F.2d 732 (5th Cir. 1975); *Addrissi* v. *Equitable Life Insurance Society of the United States*, 503 F.2d 725 (9th Cir. 1974), *cert. denied* 420 U. S. 929 (1975). However, the mere fact that there is an inconsistency among several Courts of Appeals does not render the Fourth Circuit's decision appropriate for review by this Court at this time. Neither *Meicler* nor *Addrissi* discussed the legislative history which purportedly limits the application of the McCarran-Ferguson Act; nor did they attempt to reconcile their interpretations with the contrary language of the provision in question. Rather, each of those decisions simply stated, without any reasoning, that the legislative history of the Act demonstrated a Congressional intent to limit the exception to a narrow class of cases.[1] This historical conclusion is clearly inconsistent with this Court's discussion of the legislative background surrounding the passage of the McCarran-Ferguson Act contained in *S. E. C.* v. *National Securities*, 393 U. S. 453, 459 (1969):

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[1]Each of these decisions relied upon the holding in *Transnational Insurance Company* v. *Rosenlund*, 261 F. Supp. 12 (D. Ore. 1966), which did not discuss the legislative history upon which it was relying.

Under the regime of Paul v. Virginia, supra, States had a free hand in regulating the dealings between insurers and their policyholders. Their negotiations, and the contract which resulted, were not considered commerce and were, therefore, left to state regulation. The South-Eastern Underwriters decisions threatened the continued supremacy of the States in this area. The McCarran-Ferguson Act was an attempt to turn back the clock, to assure that the activities of insurance companies in dealing with their policyholders would remain subject to state regulation. As the House Report makes clear, "[i]t [was] not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the South-Eastern Underwriters Association Case." HR Rep. No. 143, 79th Cong, 1st Sess, 3 (1945).

Furthermore, since both *Meicler* and *Addrissi* ruled on issues that are quite dissimilar from those raised in this matter, the Petitioners' reliance on those authorities is misplaced. In *Meicler,* a dissatisfied policyholder attempted to circumvent the McCarran-Ferguson exception applicable to uniform risk classification among regulated insurance companies by contending that the refusal to sell a policy at other than the established rate constituted a group boycott which violated the antitrust laws. Similarly, in *Addrissi* a policyholder alleged that the practice of a regulated insurer which required the purchase of a life insurance policy as a prerequisite to obtaining a real estate loan constituted an illegal tying arrangement which fell within the "boycott exception" to the McCarran-Ferguson Act. Neither of these cases presented factual circumstances which resemble the fact allegations in this matter. Here the chiropractors' complaint charges that insurance companies have conspired with non-insurance companies to boycott competitors

of those non-insurance companies for the purpose of enabling those non-insurance companies to monopolize a non-insurance market. This is certainly a different situation from those of *Meicler* and *Addrissi.* Because of this, it is submitted that the Fourth Circuit's decision is not as significant as the Petitioners contend and that the apparent conflict among the circuits is more illusory than real.

Moreover, the Fourth Circuit's decision cannot possibly "wreak havoc with the Congressionally mandated scheme of State regulation," nor will it open the floodgates of litigation, as argued by the petitioners. All that court did was hold that the chiropractors' claim of insurance company boycott raised a litigable issue which warranted further factual development. It is anticipated that there will be much dispute over these factual matters. It is submitted that before this Court should consider the scope of the McCarran-Ferguson Act, it should have the benefit of that full and complete factual record.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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